

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
MARCH SESSION, 1996**

TROY BROADRICK,)
)
Appellant)
)
vs.)
)
STATE OF TENNESSEE,)
)
Appellee)

No. 01C01-9508-CR-00252

SUMNER COUNTY

Hon. Jane Wheatcraft, Judge

(Post-Conviction)

FILED

June 27, 1996

**Cecil W. Crowson
Appellate Court Clerk**

For the Appellant:

Steven F. Glaser
Asst. Public Defender
117 East Main Street
Gallatin, TN 37066

For the Appellee:

Charles W. Burson
Attorney General and Reporter

Mary Ann Queen
Legal Assistant
William David Bridgers
Assistant Attorney General
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493

Lawrence Ray Whitley
District Attorney General

Dee D. Gay
Asst. District Attorney General
Cordell Hull Building
Gallatin, TN 37066

OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Troy Broadrick, appeals the trial court's dismissal of his second petition for post-conviction relief.¹ On appeal, the appellant essentially contends that both trial and appellate counsel were ineffective, thereby violating the appellant's rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 9 of the Tennessee Constitution. Moreover, the appellant argues that he was denied a full and fair hearing of his case, as required by the Fifth and Fourteenth Amendments of the United States Constitution and Article I, section 8 of the Tennessee Constitution, by (1) counsel's performance at trial and on direct appeal and (2) the trial court at his first post-conviction hearing.

I. Factual Background

The appellant is currently serving an effective sentence of sixty-three years in the Department of Correction following his convictions for nine counts of aggravated rape, three counts of rape, and one count of sexual battery. This court affirmed the appellant's convictions on direct appeal. State v. Broadrick, No. 88-257-III (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1989).

On March 5, 1990, the appellant filed his first pro se petition for post conviction relief. In his pro se petition, the appellant included the following issues :

1. Counsel provided ineffective assistance by

¹On various documents in the record, the appellant's name is also spelled in the following manners: "Troy Broderick;" "Troy Broaderick;" and "Tory Boraderick." Nevertheless, the appellant's signature consistently reflects the spelling "Troy Broadrick." Moreover, this court's previous opinions reflect the spelling "Troy Broadrick."

- withholding tapes which were important to the appellant's defense.
2. The appellant's right to due process of the law was violated when a guard entered the jury room during deliberation and when the prosecutor's victim-witness coordinator came into contact with the jury during deliberation.
 3. The appellant's right to due process of the law was violated when the trial judge attempted to rush the jury's deliberation.
 4. The appellant's right to due process of the law was violated when an employee of the Department of Human Services, testifying on behalf of the State, lied concerning the availability of a certain tape.
 5. The appellant's rights to due process of the law and equal protection were violated when a detective with the Sumner County Sheriff's Department threatened the appellant's wife in order to obtain testimony favorable to the State.

The appellant was then appointed counsel, who filed an amended petition. The amended petition set forth numerous issues relating to ineffective assistance of counsel, but omitted the above five issues. On May 31, 1991, at the conclusion of an evidentiary hearing, the trial court dismissed the appellant's petition, finding that the appellant had failed to establish ineffective assistance of counsel at any stage of the proceedings. This court affirmed the trial court's dismissal of the petition. Broadrick v. State, No. 01C01-9109-CC-00260 (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1992).

On April 27, 1994, the appellant filed a second pro se petition for post-conviction relief. Again, the trial court appointed counsel, who filed an amended petition. The amended petition set forth the five issues originally raised in the appellant's first pro se petition. On April 3, 1995, following an evidentiary hearing, the court dismissed the appellant's petition, finding that the appellant's contentions are meritless.

II. Analysis

Initially, we note that, in his brief, the appellant only addresses ineffective

assistance of counsel, relying largely upon factual allegations set forth in his first amended petition for post-conviction relief. The appellant argues that he was not afforded a full and fair hearing on his original post-conviction petition. Although the opportunity to collaterally attack constitutional violations occurring during the conviction process is not a fundamental right entitled to heightened due process protection, nevertheless due process requires that litigants be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner. Burford v. State, 845 S.W.2d 204, 207-208 (Tenn. 1992). See also House v. State, 911 S.W.2d 705, 711 (Tenn. 1995), cert. denied, ___ U.S. ___, ___ S.Ct. ___ (1996). We conclude that the appellant's claim of ineffective assistance of counsel has been previously determined in accordance with principles of due process. Tenn. Code Ann. §40-30-112(a) (1990). This court, in reviewing the trial court's denial of the appellant's first petition, observed that the trial court allowed the appellant to develop his ineffective assistance issue fully. Broadrick, No. 01C01-9109-CC-00260. Additionally, this court concluded that the record supports the trial court's conclusion that the appellant was afforded effective assistance of counsel at trial and on appeal. Id.

With respect to the additional factual allegations raised in the instant petition, this court has previously held that the issue of ineffective assistance of counsel is a single "ground for relief" as contemplated by Tenn. Code Ann. § 40-30-111 (1990). Cone v. State, No. 02C01-9403-CR-00052 (Tenn. Crim. App. at Jackson, March 22, 1995), perm. to appeal denied, (Tenn. 1996). In Cone, we observed

A petitioner may not relitigate a previously determined issue by presenting additional factual allegations. We should not encourage postconviction petitioners to invent new facts to revive an issue which was unfavorably decided, nor should we allow petitioners to 'sandbag' by reserving factual claims until their second or third petition.

Id. In any event, the appellant was afforded an evidentiary hearing on his

second petition for post-conviction relief and was permitted to present to the trial court additional proof in support of his claim of ineffective assistance of counsel. The trial court concluded that the appellant's contention is meritless. In reviewing post-conviction proceedings, the factual findings of the trial court are conclusive on appeal unless the evidence preponderates against such findings. Davis v. State, 912 S.W.2d 689, 697 (Tenn. 1995); Cooper v. State, 849 S.W.2d 744, 746 (Tenn. 1993); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). We conclude that the record supports the trial court's finding that the appellant once again failed to carry his burden of proving ineffective assistance of counsel. Wade v. State, 914 S.W.2d 97, 101 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995); McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983).²

The appellant completely neglects to address in his brief the remaining four issues raised in the amended petition. Accordingly, under Tenn. R. App. P. 27(a)(4) and (7) and Ct. of Crim. App. Rule 10(b), the appellant has waived these issues. Moreover, these issues have been waived due to the appellant's failure to raise them in prior proceedings. Tenn. Code Ann. § 40-30-112(b). Contrary to the appellant's assertion, "the rebuttable presumption of waiver is not overcome by an allegation that [the appellant] did not personally ... waive the ground for relief. ... [An appellant] is bound by the action or inaction of his attorney." See House, 911 S.W.2d at 714. Therefore, his attorney's omission of issues from the first amended petition resulted in the appellant's waiver of those issues for the purpose of this second post-conviction proceeding.

²We note that if counsel was effective at all stages of the proceedings, then, clearly, counsel's performance did not deny the appellant an adequate hearing of his case pursuant to principles of due process. See generally Ingraham v. Wright, 430 U.S. 651, 671 n. 40, 672-674, 97 S.Ct. 1401, 1412 n. 40, 1413-1414 (1977)(the state may not impose punishment until it has secured a formal adjudication of guilt in accordance with due process of law); Ponzi v. Fessenden, 258 U.S. 254, 260, 42 S.Ct. 309, 310 (1922)("[o]ne accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended").

The appellant cites Williams v. State, 831 S.W.2d 281 (Tenn. 1992), for the proposition that, because the issues raised in the appellant's original pro se petition were never fully adjudicated, the appellant could not have waived those issues. However, in Williams, our supreme court addressed the effect on subsequent petitions of the withdrawal of a petition by an appellant prior to entry of the judgment. Citing Albert v. State, 813 S.W.2d 426, 428 (Tenn. 1991), the court observed that, when a prior petition has been withdrawn, there has been "no proceeding before a court at which the grounds alleged [in the instant petition] could have been presented." Williams, 831 S.W.2d at 282. Accordingly, waiver cannot occur. Id. In this case, the appellant did not withdraw his earlier petition. Rather, appellant's counsel amended his petition. The trial court then conducted an evidentiary hearing and entered a judgment on the merits of the appellant's petition.

Finally, as in the case of the appellant's claim of ineffective assistance of counsel, the record supports the trial court's conclusion that the appellant failed to prove the remaining four allegations in his petition by a preponderance of the evidence. Additionally, we note that the appellant's petition is time-barred under Tenn. Code Ann. § 40-30-102 (1990). Contrary to the appellant's assertion in his brief, our supreme court's decision in Burford is inapplicable to this case as the record demonstrates that the appellant was afforded "an opportunity for the presentation of [his] claims at a meaningful time and in a meaningful manner." 845 S.W.2d at 208. In any case, the allegations raised in appellant's second petition are not "later arising grounds" as contemplated by Burford. See Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995) ("[i]n applying the Burford rule to specific factual situations, courts should utilize a three-step process: (1) determine when the limitations period would normally have begun to run; (2) determine whether the grounds for relief actually arose after the limitations period would normally have commenced; and (3) if the grounds are "later-

arising,” determine if ... a strict applications of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim”). In contrast to the appellant’s situation in Burford, the appellant in the instant case was in no way “caught in a procedural trap” that prevented him from litigating his claims within the statute of limitations. Burford, 845 S.W.2d at 208.

Accordingly, the trial court’s dismissal of the appellant’s petition for post-conviction relief is affirmed.

DAVID G. HAYES, Judge

CONCUR:

JERRY L. SMITH, Judge

WILLIAM S. RUSSELL, Special Judge